



STATE OF INDIANA

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September 4, 2015

Mr. William Mark Scott
2406 44th Street NW
Washington, D.C., 2007

Re: Formal Complaint 15-FC-209; Alleged Violation of the Access to Public Records Act by the Indiana Finance Authority

Dear Mr. Scott,

This advisory opinion is in response to your formal complaint alleging the Indiana Finance Authority ("IFA") violated the Access to Public Records Act ("APRA"), Ind. Code § 5-14-3-1 *et. seq.* The IFA has responded to your complaint via Andy Seiwert, General Counsel. His response is enclosed for your review. Pursuant to Ind. Code § 5-14-5-10, I issue the following opinion to your formal complaint received by the Office of the Public Access Counselor on July 22, 2015.

BACKGROUND

Your complaint filed on July 22, 2015, alleges that the Indiana Finance Authority violated the Access to Public Records Act by failing to produce the information you requested.

You had asked the IFA for access to "correspondence and agreements received, created, sent or executed relating to an examination by the U.S. Internal Revenue Service of the tax-exempt status of the \$43,960,000 Indiana Health Facility Financing Hospital Revenue Bonds, Series 1993 (Union Hospital)." In other words, you seek information related to an examination, or audit, of these bonds' tax-exempt status.

The IFA denied the request, citing 26 U.S.C. § 6103 which states that returns and return information shall be confidential. Therefore Ind. Code § 5-14-3-4(a)(3) also applies, prohibiting the disclosure of information declared confidential by Federal law.

You believe that since the IFA is considered a taxpayer for IRS purposes, the IFA is able to disclose the information at its discretion. However, while the IFA admits it is technically considered a "taxpayer" by the IRS for limited purposes, the hospital system



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is the “conduit borrower,” and so the hospital system “owns” the information – the IFA is merely a custodian of those records based upon a fiscal relationship. According to the IFA, the IFA cannot fulfill your request without a waiver from the hospital system.

ANALYSIS

The public policy of the APRA states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” See Ind. Code § 5-14-3-1. The Indiana Finance Authority is a public agency for the purposes of the APRA. See Ind. Code § 5-14-3-2(n)(1). Accordingly, any person has the right to inspect and copy the Office’s disclosable public records during regular business hours unless the records are protected from disclosure as confidential or otherwise exempt under the APRA. See Ind. Code § 5-14- 3-3(a).

26 USC § 6103 states:

(a) General rule

Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section or section 6104 (c), and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), subsection (k)(10), paragraph (6), (10), (12), (16), (19), (20), or (21) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term “officer or employee” includes a former officer or employee.



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Tax return information is defined very broadly by 26 U.S.C. § 6103(b). The IFA relies on Section 6103 as justification for the denial of your request.

You argue this section is inapplicable to the IFA because the application of the statute is limited to state tax enforcement agencies and not intended to cover the issuer of a tax-exempt municipal bond.

I disagree that the language "any local agency administering a program listed in subsection (1)(7)(D) who has or had access to returns or return information under this section or section 6104 (c)" modifies the entire series listed in subsection (a)(2). Therefore the statute can be read as follows:

no officer or employee of any State... shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section

The IFA is a state public agency authorized to issue bonds. It is acting in connection with its official duties and has received the tax return information as a governmental entity. Consequently, the IFA is subject to audit by both the Indiana State Board of Accounts and the Internal Revenue Service. These regulatory agencies ostensibly have reporting requirements and the information is disclosed to them for examination purposes.

As such, you also argue that the IFA should be able to waive confidentiality for whistleblowing purposes. While I do not necessarily find this argument germane to the matter at hand, IFA may have the *discretion* to waive certain confidentiality provisions based on its status as the taxpayer. Given that Union Hospital's information is inextricably linked to IFA's, it would likely need Union Hospital's consent to do so.

Furthermore, as noted in IFA's response, Ind. Code § 5-14-3-4(a)(5) also prohibits the disclosure of confidential financial information. This term is not defined in statute or case law, however, in the *Opinion of the Public Access Counselor 03-FC-56*, Acting Counselor Susan K. Barger opined, "The word 'confidential' is defined as 'imparted in confidence, secret.' *New Illustrated Webster's Dictionary* 211(1992). 'Financial' is defined as 'of or relating to finance.' *Id.* at 364. Therefore, 'confidential financial information' means information that is secret relating to finance." This analysis has been used by subsequent Public Access -Counselors and I see no reason to deviate from that conclusion. Taxpayer information falls squarely into this definition based upon Section 6103.



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CONCLUSION

I am not compelled by the argument that the IFA's position as a bond-issuer strips the return information of its confidentiality. While it may have the discretion to waive confidentiality with Union Hospital's consent, I do not believe they are compelled to do so. Based on the foregoing, it is the Opinion of the Public Access Counselor that the Indiana Finance Authority did not violate the Access to Public Records Act.

Regards,

A handwritten signature in black ink, appearing to read "LH Britt", is written over a horizontal line.

Luke H. Britt
Public Access Counselor

Cc: Andy Seiwert